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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

BRIAN C. APPLGATE,
Plaintiff,
vs.
N. CLARK, et al.,
Defendants.

1:15-cv-00207-LJO-EPG-PC
ORDER RE PLAINTIFF'S NOTICE OF
VOLUNTARY DISMISSAL
(ECF No. 21.)
ORDER VACATING SETTLEMENT
CONFERENCE IN THIS CASE
SCHEDULED BEFORE MAGISTRATE
JUDGE BARBARA A. MCAULIFFE ON
SEPTEMBER 29, 2016 AT 9:00 A.M.
(ECF No. 19.)
ORDER VACATING JULY 28, 2016
ORDER AND WRIT OF HABEAS
CORPUS AD TESTIFICANDUM TO
TRANSPORT INMATE WITNESS **BRIAN
C. APPLGATE, CDCR# F-66552** ON
SEPTEMBER 29, 2016 AT 9:00 A.M.
(ECF No. 20.)
ORDER DIRECTING CLERK TO CLOSE
FILE

Brian C. Applegate ("Plaintiff") is a state prisoner proceeding *pro se* in this civil rights action pursuant to 42 U.S.C. § 1983 and related state law claims. This action was initiated by civil complaint filed by Plaintiff in the Kings County Superior Court on December 1, 2014 (Case #14-C0325). On February 4, 2015, defendants Clark, Graves, Robicheaux-Smith, and Caviness removed the case to federal court under 28 U.S.C. § 1441(a). (ECF No. 1.)

1 This case is scheduled for a Settlement Conference on September 29, 2016 at 9:00 a.m.
2 before Magistrate Judge Barbara A. McAuliffe in Courtroom 8 at the United States District
3 Court in Fresno, California, and a Writ of *Habeas Corpus ad Testificandum* was issued on July
4 28, 2016, to transport Plaintiff to attend the settlement conference in person. (ECF Nos. 19,
5 20.)

6 On August 15, 2016, Plaintiff filed a notice of voluntary dismissal of the Complaint.
7 (ECF No. 21.) Plaintiff also requests the Court to vacate the Settlement Conference and the
8 Writ of *Habeas Corpus ad Testificandum*. (Id.)

9 The Court construes Plaintiff's notice of voluntary dismissal as a notice of dismissal
10 under Rule 41(a)(1). In Wilson v. City of San Jose, the Ninth Circuit explained:

11 Under Rule 41(a)(1), a plaintiff has an absolute right to voluntarily
12 dismiss his action prior to service by the defendant of an answer or a motion for
13 summary judgment. Concha v. London, 62 F.3d 1493, 1506 (9th Cir. 1995)
14 (citing Hamilton v. Shearson-Lehman American Express, 813 F.2d 1532, 1534
15 (9th Cir. 1987)). A plaintiff may dismiss his action so long as the plaintiff files
16 a notice of dismissal prior to the defendant's service of an answer or motion for
17 summary judgment. The dismissal is effective on filing and no court order is
18 required. Id. The plaintiff may dismiss some or all of the defendants, or some
19 or all of his claims, through a Rule 41(a)(1) notice. Id.; Pedrina v. Chun, 987
20 F.2d 608, 609-10 (9th Cir. 1993). The filing of a notice of voluntary dismissal
21 with the court automatically terminates the action as to the defendants who are
22 the subjects of the notice. Concha, 62 F.2d at 1506. Unless otherwise stated,
23 the dismissal is ordinarily without prejudice to the plaintiff's right to commence
24 another action for the same cause against the same defendants. Id. (citing
25 McKenzie v. Davenport-Harris Funeral Home, 834 F.2d 930, 934-35 (9th Cir.
26 1987)). Such a dismissal leaves the parties as though no action had been
27 brought. Id.

28 Wilson v. City of San Jose, 111 F.3d 688, 692 (9th Cir. 1997). In this case, no defendant has
filed an answer or motion for summary judgment. Therefore, Plaintiff's notice of dismissal is
effective on the date it was filed. Accordingly, the Settlement Conference and the Writ of
Habeas Corpus ad Testificandum shall be vacated, and this case shall be closed.

Based on the foregoing, IT IS HEREBY ORDERED that:

1. Plaintiff's notice of voluntary dismissal, filed on August 15, 2016, is effective as
of the date it was filed;

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- 1 2. The Settlement Conference scheduled for September 29, 2016 at 9:00 a.m. in
2 this case before Magistrate Judge Barbara A. McAuliffe in Courtroom 8 is
3 **HEREBY VACATED** from the Court's calendar;
- 4 3. The Court's order of July 28, 2016, ordering that a Writ of *Habeas Corpus ad*
5 *Testificandum* issue, and the Writ of *Habeas Corpus ad Testificandum* issued on
6 July 28, 2016, commanding the production of inmate Brian C. Applegate,
7 CDCR# F-66552, are **HEREBY VACATED**;
- 8 4. This action is **DISMISSED** in its entirety without prejudice;
9 and
- 10 5. The Clerk of the Court is **DIRECTED** to close the file in this
11 case and adjust the docket to reflect voluntary dismissal of this
12 action pursuant to Rule 41(a).



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14 IT IS SO ORDERED.

15 Dated: August 16, 2016

16 /s/ Lawrence J. O'Neill
17 UNITED STATES CHIEF DISTRICT JUDGE
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